



This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of fact and conclusions of law. In this two-sided appeal, the plaintiff contends that the trial court erred in denying the recovery of incurred medical expenses; the defendant contends the trial court erred in granting the plaintiff temporary total benefits and permanent partial disability benefits. The focus of this dispute is plaintiff's employment application wherein, the defendant contends it was not correctly filled out by the plaintiff, and was materially misleading, and therefore the plaintiff is estopped from claiming benefits.

In accordance with T.C.A. § 506-225(e), the standard of review in this case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings. It is the plaintiff's burden to show by the preponderance of the evidence that the evidence is otherwise in relation to the trial court's denial of medical benefits; likewise, it is the burden of the defendant to show that the court erred in granting the Plaintiff both temporary total benefits and permanent partial benefits.

The panel concludes that the trial court's judgment approving temporary total benefits and permanent partial benefits was correct and should be affirmed. The panel, however, reverses the trial court in the denial of the medical benefits of two of plaintiff's treating physicians.

Plaintiff, age 62 at the time of the trial and a divorced mother of six children has an eighth grade education and vocational training as a nurse's aide. Her first employment was domestic work in the homes of the other people and later in commercial pressing. Subsequently, the plaintiff worked for Genesco where she built and inspected shoes. During her employment with Genesco, plaintiff injured her neck and left her employment there.

As a result of this injury at Genesco, plaintiff underwent surgery by Dr. Arthur Cushman for a ruptured disc. At the trial plaintiff testified that Genesco had told her she did not qualify for workman's compensation benefits. Later, however, plaintiff acknowledged that she hired an attorney and brought suit against Genesco for workman's compensation benefits. She was successful in obtaining benefits.

Plaintiff, in the summer of 1988, applied for work with the defendant; in filling out the application for employment, plaintiff was required to answer questions about her medical history. In response to questions about her prior surgeries and prior work related injuries, she wrote “ruptured dis”. Nevertheless, she also answered that she had never collected workman’s compensation nor had she ever made a workman’s compensation claim. Parenthetically, she testified at trial that she did not understand that suing and receiving court ordered benefits were the same thing as making a claim or receiving benefits.

In response to other questions on the application, and orally during an interview, Plaintiff answered that she had no restriction of any nature. After completing the application process and interviewing Paulette Thacker, then Director of Nurses for the Defendant, she was hired by Ms. Thacker to feed patients part time.

After a year of working as a feeder, plaintiff completed nurses’ aide training and became a full time employee in the summer of 1989. In her capacity as a nurses’ aide, plaintiff testified that she bathed and fed patients, made beds, took blood pressure, checked urine, lifting and carrying patients and generally walked all day in her job activity. During the trial Ms. Thacker testified that a person with a previous history of back injury would not have been promoted to the position of a certified nurse’s aide.

Subsequently, on December 26, 1990, plaintiff testified that she injured her back, neck, and both arms while holding a patient during the removal of a bowel impaction. Since this injury at work, plaintiff testified that she is unable to work for the defendant because of the physical demands of the work and that she is limited in her ability to do her own housework, which she was able to do before the injury.

Plaintiff applied for Social Security Disability benefits in 1978,1980, 1986, 1989, and 1993, but was never granted benefits. Currently, plaintiff’s only source of income is social security retirement benefits.

The expert testimony at the trial consisted of four physicians.

the plaintiff as a result of an earlier injury incurred at Genesco. He then treated her for the subsequent injury which is the subject of this case. He saw plaintiff on March 21, 1991 and diagnosed her as having a back strain, though he noted bulging from a previous MRI. Dr. Wiesman referred the plaintiff to Dr. Everette Howell, Jr., but saw her again on May 10, 1991 and July 15, 1991. Dr. Wiesman did not opine plaintiff had any stenosis of the spine because she lacked symptoms in her legs. On the July 15 visit, Dr. Wiesman determined that she had reached maximum medical improvement and he, Dr. Wiesman, did not render a rating of permanent partial impairment.

Dr. Howell, a neurosurgeon, testified that he saw the plaintiff on April 11, 1991 and noted evidence of stenosis, a disc bulge, and degenerative changes based on the previous MRI; and he diagnosed her with a lumbar strain. On November 13, 1991, Dr. Howell found that plaintiff's condition had worsened and he ordered a MRI; the MRI showed evidence of spinal stenosis. Dr. Howell concluded that the plaintiff had reached maximum medical improvement on November 13, 1991. Dr. Howell rated the plaintiff as having a 5% permanent partial impairment and restricted her to light duty works.

Dr. Arthur Bond, a neurosurgeon, saw plaintiff on referral on July 13, 1992. Dr. Bond examined the plaintiff and found her to have chronic compression secondary to spinal stenosis and performed surgery on October 13, 1992; Dr. Bond subsequently awarded an 11% permanent partial disability. Dr. Bond determined that the injury on the job had aggravated pre-existing stenosis and rendered it symptomatic. He also placed her on light restrictions.

Dr. Rex Arendall, neurosurgeon, first saw the plaintiff on February 2, 1994. On March 3, 1994, he performed a decompressive cervical laminectomy and a lateral fusion. He determined that she had reached maximum medical improvement on December 12, 1991 and rated her as retaining a 15 permanent partial disability and he directed her to avoid repetitive bending, stooping, or lifting over 25 pounds.

The Chancellor ruled from the bench that the plaintiff did not willfully and knowingly, falsely misrepresent facts about her physical condition on the employment application; the Chancellor also ruled the defendant did not rely upon any misrepresentation by the plaintiff. Later, by

memorandum, the Chancellor awarded plaintiff 45% permanent partial disability to the body as a whole and temporary total benefits for uncompensated periods following her two surgeries and up to the two dates her two surgeons rated her as reaching maximum medical improvement. The Court, however, did not award plaintiff recovery of medical expenses of Dr. Arendall and Dr. Bond.

The primary question before the court is whether the plaintiff is estopped from receiving benefits for failure to disclose her true physical condition? While the record discloses inconsistencies in the testimony of the plaintiff as well as discrepancies in the evidence produced by the defendant, the panel is of the opinion the record supports the finding of the Chancellor on the issue on whether the defendant relied on the misrepresentations of the Plaintiff.

In Tennessee, the following factors must be present before a false statement in an employment application will bar benefits: (1) The employee must have knowingly and willfully made a false representation as to his physical condition; (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring; (3) There must have been a casual connection between the misrepresentations and the injury. Berry v. Consolidated Systems, Inc., 804 S.W.2nd 445, 446 (Tenn. 1991). The plaintiff did write “dis” in the margin of a question asking about previous surgery. This alone supports the finding of the Chancellor that the defendant was put on notice. Any misrepresentation defense is waived if the employer had actual knowledge of plaintiff’s prior condition. Raines v. Shelby Williams Indus., 814 S.W.2nd 346 (Tenn. 1991).

The panel is of the opinion that the issue of whether temporary total benefits are due is bootstrapped to the primary issue of permanent partial disability and thus affirms the Chancellor.

Further, the record supports the finding of 45% based on the medical proof.

There is a secondary issue in this case relating to continuing medical benefits allowed by law. In as much as the panel has affirmed the Chancellor on the causation issue and affirmed the finding of the trial court on the issue of disability benefits, the Panel also finds that the medical services of Dr. Arthur Bond and Dr. Rex Arendall are directly related to the injury on the job and awards plaintiff those medical benefits subject to a reasonable attorneys fee.

The case is affirmed as to the issues of permanent partial disability and temporary total disability. The panel reverses the Chancellor on the denial of medical benefits inclusive of the medical services of Dr. Arthur Bond and Dr. Rex Arendall and remands the case to the trial court for that purpose and also for the purpose of setting a reasonable attorney's fee.

Costs to be paid by Defendant/Appellant.

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Hamilton V. Gayden, Special Judge

CONCUR:

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Adolpho A. Birch, Jr., Justice

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John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

FANNIE BEATRICE CARTER,	)	MARSHALL CHANCERY
	)	NO. 8486
PLAINTIFF/APPELLEE,	)	
	)	HON. F. LEE RUSSELL,
v.	)	CHANCELLOR
	)	
NATIONAL HEALTH CARE CENTER	)	
AND NATIONAL HEALTH CARE	)	S. CT. NO. 01S01-9704-CH-00093
CORP., LP,	)	April 8, 1998
	)	
DEFENDANT/APPELLANT.	)	AFFIRMED

**FILED**  
Cecil W. Crowson  
Appellate Court Clerk

**JUDGMENT**

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well taken and should be denied; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Defendant/Appellant, for which execution may issue if necessary.

It is so ordered this 8th day of April, 1998.

PER CURIAM

BIRCH, J. NOT PARTICIPATING